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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AYSCOUGH & MARAR, Plaintiffs and Respondents, v. MICHAEL JACKSON et al., Defendants and Appellants.	B202174 (Los Angeles County Super. Ct. No. YC052627)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Mundell, Odlum & Haws, and Thomas C. Mundell, for Defendants and Appellants.

Nemecek & Cole, Michael McCarthy, Mark Schaeffer, and Janette S. Bodenstein, for Plaintiffs and Respondents.

After the trial court struck appellants'affirmative defenses as a discovery sanction, appellants agreed to the entry of judgment. They now appeal.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On February 21, 2006, respondent law firm, Ayscough & Marar (A&M), filed an action for breach of contract against appellants Michael J. Jackson, MJJ Productions, Inc., and Fire Mountain Services, LLC. The complaint alleged that appellants engaged A&M to represent them in specified civil litigation and failed to compensate A&M in accordance with their written agreement. On August 29, 2006, appellant initiated a cross-action against A&M and respondents Brent Ayscough and Sidney Lanier. [1] Trial was set for June 26, 2007.

Respondents sought and obtained an order compelling Jackson to submit to a deposition, which occurred on February 28, 2007. On April 18, 2007, appellants filed their first amended answer to A&M's complaint, which asserted several defenses, including unclean hands, violations of the Business and Professions Code and California Rules of Professional Conduct by A&M, and the necessity for an offset. A&M propounded written discovery to appellants regarding the defenses, and sought to depose appellants. Appellants failed to appear for the noticed depositions, and sought a protective order shielding them from the depositions and A&M's written discovery. A&M filed motions for orders compelling the depositions and the production of documents at the depositions.

On June 1, 2007, A&M filed several motions in limine, including a motion for an order excluding all evidence and testimony not disclosed by appellants prior to the discovery cutoff. On June 12, 2007, the trial court denied appellants'

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[1] Appellants' cross-complaint was dismissed without prejudice pursuant to a stipulated order on June 12, 2007.

motion for a protective order and granted A&M's motions to compel. In so ruling, the trial court found that Jackson had improperly terminated his February 2007 deposition, and awarded monetary sanctions against appellants and their counsel.

On June 25, 2007, A&M filed an ex parte application for an order striking appellants' first amended answer, entering a default judgment, or imposing evidentiary or issue sanctions for appellants' refusal to comply with the June 12, 2007 order. The application asserted that appellants had failed to appear for their depositions following the June 12, 2007 order, and had otherwise not responded to A&M's demands for written discovery. On June 25, 2007, appellants' counsel appeared before the trial court, which ruled that "the ex parte [was] continued as a motion in limine."

On June 26, 2007, the date set for trial, appellants filed an opposition to "plaintiff's motion regarding the failure of defendants to appear for a court-ordered deposition." The opposition argued that terminating sanctions would not be appropriate, because appellants' failure to appear for the depositions "was not entirely willful" and because the deponents would not provide fresh evidence relevant to appellants' defenses. After hearing oral argument, the trial court ordered the defenses asserted in the first amended answer stricken, reasoning that appellants' misconduct in discovery had impaired A&M's ability to address the defenses. Pursuant to appellants' stipulation, judgment was entered in respondents' favor on July 13, 2007.

DISCUSSION

Appellants contend that the trial court erred in striking their affirmative defenses as a discovery sanction.

A. *Governing Principles*

Terminating sanctions -- which include the striking of portions of a party's pleading (§ 2023.030, subd. (d)(1)) -- may in some circumstances be imposed as a sanction for discovery abuse. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246.) Misuses of the discovery process include the following: "(d) Failing to respond or submit to an authorized method of discovery. [¶] . . . [¶] (f) Making an evasive response to discovery. [¶] (g) Disobeying a court order to provide discovery." (Code Civ. Proc.,[2] § 2023.010.)

"'The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be wilful [citation].' [Citation.]" (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36.)

B. *Appellants' Contentions*

Appellants challenge the sanctions on two grounds. As we explain below, neither has merit.[3]

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[2] All further statutory references are to the Code of Civil Procedure.

[3] Appellants' reply brief asserts for the first time on appeal an additional contention, namely, that the trial court's treatment of the ex parte application as a motion in limine contravened local court procedural rules. Because this contention is not found in their opening brief, they have forfeited it. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp.769-771.) Moreover, it fails on the merits for the reasons explained below (see pt. B.1., *post*).

1. *Sanctions Upon Ex Parte Application*

Appellants contend that the trial court improperly imposed terminating sanctions on the basis of an ex parte application. We disagree. Generally, discovery sanctions may not be ordered ex parte. (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208 (*Sole Energy Co*.); *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5-6 (*Alliance Bank*); *Duggan v. Moss* (1979) 98 Cal.App.3d 735, 743 (*Duggan*). As the court explained in *Alliance Bank*, such sanctions contravene the due process requirements of the state and federal Constitutions and the procedural requirements of the discovery statutes.[4] (*Alliance Bank*, *supra*, 161 Cal.App.3d at p. 6.) Nonetheless, if the person against whom ex parte sanctions are sought voluntarily appears at the hearing on the application and opposes it on the merits, the person may forfeit his or her challenges on appeal to sanctions imposed following the hearing. (*Id*. at pp. 5-6.)

We find dispositive guidance on appellants' contention from *Alliance Bank*. There, the trial court, in ordering the defendant to appear for a deposition, ruled that the plaintiff could seek terminating sanctions upon an ex parte application and two days written notice if the appellant did not comply with the order. (*Alliance Bank*, *supra*, 161 Cal.App.3d at pp. 3-4.) When the defendant did not attend the

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4 Section 2023.030 provides in pertinent part: "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose . . . sanctions against anyone engaging in conduct that is a misuse of the discovery process . . . ."

Section 2023.040 provides: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought."

deposition, the plaintiff applied ex parte for sanctions and gave the requisite notice. (*Id*. at pp. 5-6.) After the defendant appeared (through his counsel) at the hearing on the application and opposed it on the merits, the trial court issued terminating sanctions against him by striking his answer and entering a default. (*Id*. at pp. 4-5, 7-9.)

The appellate court held that the trial court's initial ruling -- which permitted the plaintiff to seek sanctions ex parte -- was "invalid for being in excess of the court's jurisdiction," but nonetheless affirmed the sanctions order. (*Alliance Bank*, *supra*, 161 Cal.App.3d at p. 6.) The court concluded that the defendant, by appearing at the hearing on the ex parte application and opposing it on the merits, had forfeited any contention regarding defective notice, and impliedly consented to "any exercise of jurisdiction in excess of the court's authority." (*Id*. at pp. 7-9.) In so concluding, the court distinguished an earlier case, *Duggan*, *supra*, 98 Cal.App.3d 735, in which the appellate court reversed terminating sanctions obtained ex parte as "invalid" and in excess of the trial court's discretion because the sanctioned party had been given no opportunity to oppose them (*id*. at pp. 738-739). (*Alliance Bank*, *supra*, 161 Cal.App.3d at p. 9.)

Here, the trial court told appellants that it would treat A&M's ex parte application as an in limine motion, and continued the hearing on it. The following day, appellants filed an opposition to the application/motion, appeared at the hearing on it, and opposed it on the merits. In view of *Alliance Bank*, they forfeited their challenges regarding defective notice and consented to the trial court's exercise of its jurisdiction beyond its authority.

Pointing to *Sole Energy Co.*, *supra*, 128 Cal.App.4th 199, appellants suggest that the order granting terminating sanctions was not merely "invalid for being in excess of the court's jurisdiction" (*Alliance Bank*, *supra*, 161 Cal.App.3d

at p. 6.), but *void*. We disagree. As this court recently explained in *Lee v. An* (2008) 168 Cal.App.4th 558, 563 (*Lee*), the term "void" is ordinarily reserved for actions outside the court's fundamental jurisdiction over the subject matter and the parties. In contrast, "when a statute authorizes a prescribed procedure and the court acts contrary to the authority conferred, the court exceeds its jurisdiction." (*Id*. at p. 564.)

Because an act in excess of jurisdiction is ordinarily *voidable*, rather than void, a person who has consented to the exercise of jurisdiction beyond the trial court's authority may be estopped from challenging the act on appeal. (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087-1088, disapproved on another ground in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280; 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 333, pp. 949-953.) Although the court in *Duggan* characterized ex parte terminating sanctions as acts in excess of jurisdiction, the first court to conclude that they are, in fact, voidable was the court in *Alliance Bank*, as this question did not arise in *Duggan*.

In *Sole Energy Co.*, the trial court, in ordering the defendants to appear for their depositions, warned them that failure to comply would result in sanctions. (*Sole Energy Co.*, *supra*, 128 Cal.App.4th at pp. 203- 204.) When the defendants did not attend the depositions, the plaintiffs served the defendants with a notice of a motion for unspecified sanctions, and simultaneously applied ex parte for an order shortening time for a hearing on the motion. (*Id*. at pp. 203-204.) The trial court granted the ex parte application on the date it was filed and immediately held a hearing on the sanctions motion, at which it struck the defendants' answers and ordered the entry of their defaults. (*Ibid*.) Although the opinion in *Sole Energy Co.* does not state whether the defendants appeared at the hearing, they apparently made no appearance, as the appellate court concluded they had no notice that they

faced terminating sanctions and no opportunity to be heard on them. (*Id*. at pp. 208, 210.) Relying on *Alliance Bank* and *Duggan*, the appellate court characterized the sanctions orders as "in excess of the trial court's jurisdiction," "void," and "invalid." (*Sole Energy Co.*, *supra*, 128 Cal.App.4th at pp. 208-210.) As we explained in *Lee*, we do not regard *Sole Energy Co.* as authority on whether such orders are voidable, rather than void, as it does not discuss this issue.[5] (*Lee*, *supra*, 168 Cal.App.4th at p. 566.)

Appellants also contend that they objected to A&M's ex parte application for sanctions at the first opportunity. When A&M filed the ex parte application on June 25, 2007, appellants unsuccessfully requested a brief continuance of the trial, which was set to begin the next day. Appellants argue that the denial of the continuance was prejudicial and operated to preserve their contentions on appeal. We disagree.

The record discloses that the trial court conducted a hearing on Monday, June 25, 2007, the day before the start of trial. At the beginning of the hearing, defense counsel briefly referred to a potential agreement with opposing counsel. The trial court addressed other matters, including the parties' failure to submit

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5 We reach the same conclusion regarding *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, which appellants cite in their reply brief. In *Parker*, the plaintiff walked out of his court-ordered deposition prior to its termination. (*Id.* at p. 292.) As the plaintiff left, defense counsel said that he would seek an ex parte order to compel him to return. (*Id*. at p. 296.) The plaintiff responded, "'I don't care what you do . . . I'm not going to be participating. I'm going to be back in Atlanta.'" (*Ibid*.) Two days later, at a hearing the plaintiff apparently did not attend, the trial court, ex parte, issued an order to compel and awarded monetary sanctions against the plaintiff. (*Id*. at p. 292.) Pointing to *Sole Energy Co.*, the appellate court reversed the sanctions order as "void." (*Sole Energy Co.*, *supra*, 128 Cal.App.4th at p. 296.) As the court did not discuss whether the order was voidable, *Parker* offers no support for the proposition that such orders are void, rather than voidable.

joint trial materials, and ruled that the ex parte application was "continued as a motion in limine."

After this ruling, the following exchange occurred:

"Mr. Mundell [defense counsel]: Your Honor, one further thing just to let the court know. You had ordered us to get set for a settlement conference, and you said you would be available to sit on that. We discovered last week you were dark so we endeavored to have one in front of Judge Kwong. And we set one in front of Judge Kwong this morning at 9:00 o'clock. [¶] . . . That was the agreement I started to tell you about. We reached an agreement that[,] in light of [the] ex parte, which asks for draconian sanctions on just ex parte notice or, in the alternative, for an order shortening time. [¶] What we would do is the following: I realize this is subject to the court's agreement. We had agreed that we would trail for a week on the trial.

"The Court: Not a chance.

"Mr. Mundell: I understand.

"The Court: Zero, zero.

"[Mr. Mundell]: I understand. It still affects Judge Kwong. I would file opposition to that and they would do a reply by Friday. In the meantime we would go down to Judge Kwong, who is waiting for us and have our MSC.

"The Court: You can have an MSC if you want. If I don't dismiss it or enter default I'm -- if Judge Kwong is available and willing to do it, yes, you are ordered [to participate in a settlement conference.]"

Appellants thus raised no objection to the ex parte application/motion; they requested a continuance of the trial to conduct a settlement conference and to permit them to file an opposition to the application/motion prior to Friday, June 29, when A&M's reply would be due. To the extent appellants contend that the

trial court erred in denying the continuance, their contention fails for want of a showing of prejudice, which is not presumed on appeal. (*Eastwood v. Froehlich* (1976) 60 Cal.App.3d 523, 529.) When appellants requested the continuance, they offered no argument that its denial would prejudice their ability to oppose the application/motion. After the trial court denied the request, appellants filed an opposition the next day and participated in the hearing on the merits without suggesting they suffered prejudice for want of time to prepare their opposition.[6]

To the extent appellants contend that their request for a continuance operated to preserve their challenges to ex parte discovery sanctions, their contention also fails. As explained above, appellants never objected to the application/motion. Moreover, as the court explained in *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288-1289, a party subject to a request for discovery sanctions may forfeit its contention regarding notice even though it objected to improper notice *prior* to the hearing on the request. Forfeiture can occur if, after raising an initial objection to notice, "the party appears at the appropriate hearing and opposes the motion on the merits -- but without making any request for a continuance or demonstrating prejudice from the defective notice." (*Ibid.*, italics

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6 On appeal, appellants attempt to show prejudice by suggesting that had the trial court granted the continuance, they might have tendered additional evidence in support of their opposition, which argued, inter alia, that the depositions would have yielded no new information material to appellants' defenses. As appellants made no offer of proof regarding this evidence before the trial court, they have forfeited this contention. (See *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 382 [contention that trial court improperly denied appellant opportunity to present additional evidence at trial forfeited for want of offer of proof]; *People v. Hill* (1971) 19 Cal.App.3d 306, 320 [trial court properly denied defendant's request for continuance to secure presence of witnesses when defendant failed to make adequate offer of proof regarding witnesses' testimony].)

omitted.) Here, as we have explained, the trial court properly denied appellants' initial request for a continuance because they offered no argument they needed it in order to prepare their opposition. As they appeared at the hearing on the application/motion and again raised no suggestion of prejudice, they have failed to preserve their contentions.[7]

2. *Insufficient Findings*

Appellants contend that the trial court's findings are insufficient to support the striking of their affirmative defenses. Generally, the trial court may impose terminating sanctions as a sanction for discovery abuse "after considering the totality of the circumstances: [the] conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery." (*Lang v. Hochman*, *supra*, 77 Cal.App.4th at p. 1246.) Under this standard, trial courts have properly imposed terminating sanctions when parties have willfully disobeyed one or more discovery orders. (*Id.* at pp. 1244-1246 [discussing cases]; see, e.g., *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1617-1622 [terminating sanctions imposed when party repeatedly failed to comply with single discovery order]; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481,

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[7] Pointing to *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645 and *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, appellants contend that they did not forfeit their objections to the application/motion by failing to raise them at the hearing on June 26, 2007, because the ruling on their continuance request rendered such objections futile. Both cases are distinguishable: in each, the appellate court held that a party had not forfeited its objection to a proceeding by participating in the proceeding after the trial court rejected the party's specific objection to it. (*Boyle v. CertainTeed Corp.*, *supra*, 137 Cal.App.4th at p. 650; *Woolls v. Superior Court*, *supra*, 127 Cal.App.4th at p. 204, fn. 3.) As we have explained, appellants never objected to the application/motion on the grounds they assert on appeal.

491 (*Laguna Auto Body*), disapproved on another ground in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4 [terminating sanctions imposed when party violated single discovery order and several discovery statutes].)

Here, the trial court determined that appellants had not appeared for court-ordered depositions and had breached an agreement between the parties' counsel that obliged appellants to provide supplemental answers to A&M's written discovery. Regarding this misconduct, the trial court stated: "I'm so finding that it was a willful failure [and] that all of that discovery was directed towards the affirmative defenses. And, therefore, the appropriate remedy is not to enter the default of the [appellants] but, rather, to strike those affirmative defenses."

Appellants contend the trial court erred in imposing terminating sanctions because their failure to produce supplemental answers, taken in isolation, does not support such sanctions, as they violated no order to produce the answers. We disagree. Ordinarily, noncompliance with a discovery order is a prerequisite for the imposition of terminating sanctions. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 277-279.) That condition is met here, as appellants failed to appear for court-ordered depositions that A&M had noticed to obtain discovery regarding appellants' affirmative defenses.

The fact that the trial court also considered appellants' related discovery abuse in imposing terminating sanctions does not vitiate its order. In *Laguna Auto Body*, the plaintiffs were ordered to respond to interrogatories, but they repeatedly failed to do so. (*Laguna Auto Body*, *supra*, 231 Cal.App.3d at pp. 483-484.) The plaintiffs also failed to appear for noticed depositions. (*Id*. at p. 484.) In terminating the plaintiffs' action as a discovery sanction and denying reconsideration of this ruling, the trial court relied on "'the plaintiff[s'] actions" as a basis for the sanctions. (*Id*. at p. 486.) The appellate court affirmed, reasoning

that the plaintiffs had violated a court order and various discovery statutes. (*Id*. at pp. 487-491.) The court rejected the plaintiffs' contention that dismissal for failing to attend the noticed deposition was an inadequate basis for the sanctions order, pointing to plaintiffs' noncompliance with the order regarding the interrogatories. (*Id*. at pp. 489-490.)

In view of *Laguna Auto Body*, we see no abuse of discretion. The trial court, in assessing whether terminating sanctions were warranted, was authorized to "consider[] the totality of the circumstances." (*Lang v. Hochman*, supra, 77 Cal.App.4th at p. 1246.) Aside from determining that appellants had failed to appear for court-ordered depositions, the trial court found that appellants had violated an agreement to provide supplemental discovery responses relevant to appellants' affirmative defenses. Nothing before us suggests that the trial court viewed the violation of this agreement as an independent basis for the sanctions. There was no error.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.